

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

Note - 164 a L R, 192

BRIEF FOR APPELLEE

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA

524

No. 9396

October Term, 1946

*United States Court of Appeals
for the District of Columbia*

FILED JAN 16 1947

BERNARD E. NOVAK, *Appellant*

V.

Engelhardt
CLERK

DISTRICT OF COLUMBIA, *Appellee.*

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IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA

October Term, 1946

No. 9396

BERNARD E. NOVAK, *Appellant*,

v.

DISTRICT OF COLUMBIA, *Appellee*.

BRIEF FOR APPELLEES

SUMMARY OF ARGUMENT

The Municipal Court found, basing its finding upon substantial and convincing evidence, and the Municipal Court of Appeals confirmed the finding, that in submitting the specimen of urine

for analysis the appellant committed a voluntary act while subject to a valid arrest. The appellant has never questioned the validity of his arrest, and all of his arguments addressed to the applicability of the 4th amendment of the Constitution to the facts of the case are therefore without merit.

Before the protection of the 5th amendment can be invoked by the appellant, it must be established that the submission of the specimen was an involuntary act; for, if it was voluntary, the Constitutional guarantees are waived. It is not, and never has been, appellant's contention that at the time of the taking of the specimen he was so completely intoxicated as to be incapable of giving consent. On the contrary, his contention is that the statement of the police officer at the time, to the effect that if the sample were "right" it would be to ~~plaintiff's~~^{appellant's} benefit, so deluded and deceived him that in submitting the sample he was not exercising a free, reasoned and intelligent judgment. Obviously there is nothing untrue in the officer's statement, nor is there any possible misconstruction which the appellant might make of it which would deprive him of the discretion of which he was capable. In fact, it is not necessarily to be interpreted as an inducement of any kind, proper or improper. Certainly from all of the testimony adduced relating to the circumstances of the submission the trial court was justified in concluding that as a matter of fact the giving of the specimen was a voluntary act, and having so concluded upon substantial evidence its judgment may not be disturbed upon appeal.

However, even if this Court conclude that the submission of urine was involuntary, the results of the urinalysis were properly introduced into evidence. It cannot be excluded on the ground that it is of the nature of an involuntary confession, the appellant has not been compelled to give testimony against himself, and the due process clause of the fifth amendment has not been violated.

The history of the urine sample was traced from the time of its taking to the time of its delivery to Dr. Alter with more than reasonable accuracy and detail. A written laboratory record prepared by Dr. Alter, premised upon an analysis made by him of the

sample taken from the appellant, was properly introduced into evidence under the decision of this Court in New York Life Insurance Co. v. Taylor, 79 U. S. App. D. C. 66, 147 F. (2d) 297.

Thereafter the verbal evidence of Dr. Yongue concerning the results of an analysis which he performed upon the specimen was offered. The testimony that the specimen contained .24 of 1% of alcohol exactly corroborated the laboratory report which had been filed by Dr. Alter. Admittedly, the chain of continuity by which the specimen came into the hands of Dr. Yongue was not completed; for Dr. Alter was not available to the prosecution as a witness. But the discretion of the trial court in admitting the results of the urinalysis into evidence was soundly exercised; for the history of the specimen prior to analysis by Dr. Yongue sufficiently qualified his testimony, and this testimony was cumulative, of positive force only to obviate the possibility of error in calculation by Dr. Alter. There was no necessity for introduction of the specimen itself into evidence; for the appearance of the specimen itself could have given the jury no clue as to its chemical composition; and even its identification by the police officer and subsequent introduction would not have precluded the remote possibility of its adulteration in the time elapsing between analyses. The question of admissibility of Dr. Yongue's testimony was one of probabilities which the trial court properly resolved in favor of the prosecution.

The courts have recognized that it is impossible in most cases involving demonstrative evidence to prove to an absolute certainty that its identity and its condition at the time of assuming control and at the time of observation or introduction are the same. All that is required is that the chain of continuity be established to a reasonable degree and that the circumstantial evidence indicate the remoteness of the possibility of change in physical structure. This has been established in the instant case.

ARGUMENT

Relief from the judgment of the Municipal Court of Appeals is herein sought by the appellant upon two main grounds, first,

that he has been deprived of rights granted him under the Constitution by the introduction against him into evidence of the results of urinalysis examination, and second, that the history of the urine specimen prior to its analysis was not traced with sufficient definiteness to justify the introduction of the result of its examination.

I

The brief of the appellant launches into an exhaustive discussion of the application of Constitutional principles to his case before it is established with any degree of certainty that these issues are properly to be considered. It is well established in the Federal courts that Constitutional protections may be waived by those who are entitled to their benefits. *Seguro v. U. S.*, 275 U. S. 106; *Simons v. U. S.*, 119 F. (2d) 539 (9th Circ.); *U. S. v. Monia*, 317 U. S. 424; *Howard v. U. S.*, 58 App. D. C. 179, 26 F. (2d) 551; *Tomlinson v. U. S.*, 68 App. D. C. 106, 93 F. (2d) 652, Cert. den. 303 U. S. 646; *Clairborne v. U. S.*, 77 F. (2d) 682, (8th Circ.). Thus the question whether appellant voluntarily submitted a specimen of his urine for examination is of prime importance in this case. It is a familiar presumption of the law that a man's acts are the result of his intent. *Easterday v. U. S.*, 53 App. D. C. 387, 292 Fed. 664, Cert. den. 263 U. S. 719; *Bentall v. U. S.*, 262 Fed. 744; *Harris v. U. S.*, 48 F. (2d) 771. The facts apparent in the record establish simply that a police officer requested of the appellant a specimen of urine and that the appellant agreed to and did give him a specimen in response to his request, and that the officer informed him that if the sample were "right" it would operate to his benefit. Other facts of a negative nature were developed: the appellant was not informed that he had a right to refuse to give the sample, or that having given it, it might be used in evidence against him. The appellant appeared lucid and rational, and no contention has ever been made that at the time he was mentally incapable

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The courts have recognized that it is impossible in most cases involving demonstrative evidence to prove to an absolute certainty that its identity and its condition at the time of assuming control and at the time of observation or introduction are the same. All that is required is that the chain of continuity be established to a reasonable degree and that the circumstantial evidence indicate the remoteness of the possibility of change in physical structure. This has been established in the instant case.

ARGUMENT

Relief from the judgment of the Municipal Court of Appeals is herein sought by the appellant upon two main grounds, first.

that he has been deprived of rights granted him under the Constitution by the introduction against him into evidence of the results of urinalysis examination, and second, that the history of the urine specimen prior to its analysis was not traced with sufficient definiteness to justify the introduction of the result of its examination.

I

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by reason of intoxication of giving his consent to the submission of a sample.

Upon this evidence the appellant hoped to convince the trial court that the specimen was involuntarily given. To this conclusion the trial court refused to come, and the Municipal Court of Appeals affirmed its judgment, stating:

“* * * we rule there was neither duress nor inducement in the sense that would make the giving of the specimen involuntary. The record shows affirmatively that at the time defendant appeared lucid and answered questions clearly, that he was asked to give the specimen and agreed to do so. There is no suggestion that defendant was not of normal intelligence, nor of any other surrounding circumstances which have lead to the rejection of statements or confessions. * * * we hold that the trial judge was justified in ruling that the specimen was given voluntarily.”

Cases in which urine specimens were taken under similar circumstances and held to be supplied voluntarily as a matter of law are: *State v. Duguid*, 50 Ariz. 276, 72 P. (2d) 435; *State v. Werling*, 234 Iowa 1109, 13 N. W. (2d) 318; *State v. Morkrid*, 286 N. W. 412 (Iowa Sup. Ct. 1939).

But if this Court finds that the submission to the urinalysis was involuntary, appellee nevertheless is prepared to show that the results of the urinalysis examination were not excluded from introduction into evidence by Constitutional dictates. The appellant has contended that his rights under the 4th amendment have been violated, that his right to be secure in his person against unreasonable search and seizure has been violated. This position is manifestly untenable because at the time the specimen was obtained he was in custody pursuant to a legal arrest. It is unquestionably the law that a search of the person may be made and evidence of crime may be seized pursuant thereto if the subject be under valid arrest, whether with or without warrant. *Weeks v. U. S.*, 232 U. S. 383; *Bozel v. Hudspeth*, 126 F. (2d) 585; *Brady v. U. S.*,

300 Fed. 540, Cert. den. 266 U. S. 620; *Baron v. U. S.*, 286 Fed. 822, Cert. den. 262 U. S. 749; *U. S. v. Heitner*, 149 F. (2d) 105; *U. S. v. Stein*, 53 Fed. Supp. 911; *Moder v. U. S.*, 62 App. D. C. 65, 64 F. (2d) 703. Further, this complaint, coming on appeal for the first time, comes too late. Objections to the use of illegally seized evidence must be raised before trial. *Segurola v. U. S.*, 275 U. S. 106; *Bennett v. U. S.*, 70 App. D. C. 76, 104 F. (2d) 209; *Smith v. U. S.*, 72 App. D. C. 187, 112 F. (2d) 217. The record does not show timely objection or lack of opportunity therefor.

Appellant next contends that the evidence obtained from him was in the nature of a "confession," and as an involuntary confession must be excluded. But this Court, in the case of *Wood, et al., v. U. S.*, 75 U. S. App. D. C. 274, 128 F. (2d) 265, has obviated the possibility of application of this doctrine to circumstances of this kind. The rationale of the doctrine was there declared not to be a penalty imposed upon the prosecution for obtaining evidence by duress, but rather to be an exclusion of evidence which, being obtained by force or deception, was rendered completely untrustworthy and of no probative value. Obviously the mental attitude of the appellant and the method by which the specimen was obtained have no effect whatsoever on the probative force of the urinalysis figures obtained from examination of the specimen. Its probative force is obtained alone from the conditions governing the accuracy of the quantitative analysis and the effect of the expert opinion evidence interpreting the figures obtained from analysis. Accordingly, the evidence developed from the examination of the specimen should not be excluded as within the doctrine of involuntary confession.

There is no merit in the argument of appellant that the protection granted him under the 5th amendment has been denied him, that he has been compelled to become a witness against himself. In the first place, the privilege against self-incrimination may only be claimed by an individual "in a criminal case" and applies only to testimonial utterances, not to ex-

hibition or examination of demonstrative evidence. *Counselman v. Hitchcock*, 142 U. S. 547; *Holt v. U. S.*, 218 U. S. 245. Demonstrative evidence of all types obtained by compulsion has been offered and allowed in the Federal Courts, without being regarded as an infringement of the 5th amendment. In *Shaffer v. U. S.*, 24 App. D. C. 417, a photograph of the defendant was taken and introduced against him. In *McFarland v. U. S.*, 80 U. S. App. D. C. 196, 150 F. (2d) 593, the fact of the existence of blood adhering to the person of the defendant was introduced against him. In *Bratcher v. U. S.*, 149 F. (2d) 742, the physical condition of the defendant at the time of medical examination pursuant to the Selective Training and Service Act of 1940 was introduced against him. In other cases physical measurements, finger prints and foot prints have been introduced in like fashion. (e.g. *U. S. v. Cross*, 20 D. C. 365, 9 Mackey 365.)

Mr. Justice Holmes in the *Holt* case, *supra*, has conclusively disposed of the appellant's contention with respect to self incrimination. He there said:

“* * * But the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort *communications* from him, not an exclusion of his body as evidence when it may be material.
* * *” (Emphasis supplied.)

See also 22 Corpus Juris Secundum 998 (Criminal Law § 651), and cases cited in foot note 8 Wigmore on Evidence, 3rd Edition, 375, § 2265.

We think the law is succinctly stated in the case of *Commonwealth v. Musto*, 35 A. (2d) 307, 311, in which the Supreme Court of Pennsylvania said:

“* * * The purpose of the constitutional provision is to prohibit the compulsory oral examination of the prisoner either before or at trial,—to prevent his be-

ing required to incriminate himself by speech or the equivalent of speech. * * * 'Not compulsion alone is the component idea of the privilege, but testimonial compulsion. * * * Unless some attempt is made to secure a communication, written or oral, upon which reliance is to be placed as influencing his consciousness of the facts and the operations of his mind in expressing it, the demand made upon him is not a testimonial one.' * * *

The application of the Constitutional immunity from self-incrimination to a urine specimen introduced in a prosecution for operating a motor vehicle while intoxicated has been specifically rejected in the case of *State v. Gatton*, 60 Ohio App. 192, 20 N. E. (2d) 265.

There remains for disposition the further question whether the appellant's personal liberty has been invaded without due process of law.

Again it is felt that the appellant has become involved in a discussion on the merits of the question before showing that the question exists. If urine had been forcefully extracted from the appellant, as by a catheter, justification for the discussion would arise; but since the urine was expelled from the body of the appellant of his own volition, whether by inducement or not, it thereupon became abstract demonstrative evidence and had no further personal identity with the appellant. Its use as evidence may be then tested against the search and seizure clause and the self-incrimination clause of the Constitution, but it cannot be said that even an unlawful inducement practiced upon appellant which causes him voluntarily to expel his urine constitutes an invasion of the body or of personal liberty which would subject the case to application of the due process clause. The well known cases of *Jacobson v. Massachusetts*, 197 U. S. 11; *Buck v. Bell*, 274 U. S. 200; *Sibbach v. Wilson*, 312 U. S. 1, and *Beach v. Beach*, 72 App. D. C. 318, 114 F. (2d) 479, have all sanctioned the invasion by the state under proper safeguard of the personal

sanctity of the individual in the preservation of the public health, safety and welfare. These cases have respectively upheld compulsory vaccination, compulsory salpingectomy, compulsory physical examination, and compulsory blood test. We concede that the right of the sovereign to invade the person of the individual was in each of these cases buttressed upon a statute, and that no statute presently exists in the District of Columbia by which urine may be forcefully extracted or by which the introduction of urine into evidence is authorized.

The policy of the law vigorously to protect the whole of society from harm at the expense of an individual is clearly indicated, however, and if this urinalysis evidence is not inadmissible upon some other ground, as appellee submits, it cannot be excluded on the ground that the privacy or person of the appellant was invaded without authority, because, in reality, no invasion took place.

II

The law is clear that the history of the specimen has been traced in the present case with sufficient continuity to justify the admission of the urinalysis results into evidence.

In his brief appellant has cited *Smith v. U. S.*, ___ U. S. App. D. C. ___, No. 9212, decided November 4, 1946, and has referred to other Federal cases in order to establish that demonstrative evidence which is to be introduced in the case of the prosecution must be identified with the crime, and must be shown to be in substantially the same condition as at the time it was involved in crime. These cases are obviously not in point because the specimen of urine itself was not introduced into evidence, nor should it have been; for its condition at the time of trial was of no moment in the outcome of the case. Its condition and history from the time it was voided until the time it was first analyzed by Dr. Alter are controlling. The record establishes that the specimen was carefully traced by Officer Sennott from the time he obtained it until the

time he delivered it to Dr. Alter. There is nothing in the record to show that anything that happened to it during this time could have operated to the detriment of the appellant. In fact, since no testimony gives rise to a suspicion that the specimen during this period was deliberately or accidentally adulterated with a substance containing alcohol the testimony of Dr. Hunter, the pathologist, establishes that any deterioration or evaporation which could have taken place operated only to the benefit of appellant; for it is the testimony of Dr. Hunter that alcohol passes into a gaseous state at a lower temperature than any of the other components of urine, and thus, if any quantitative chemical change took place in the specimen it must necessarily have decreased the alcoholic percentage therein.

The only actual demonstrative evidence offered by the Government was the written laboratory record of Dr. Alter, who was not personally available as a prosecution witness. This record showed the alcoholic percentage of the specimen analyzed by Dr. Alter, and submitted to him by Officer Sennott as the specimen obtained from appellant. The laboratory record contained no opinionated, conjectural or hypothetical matter. It was made in the regular course of business, and its accuracy was guaranteed by the fact that it revealed only the result of scientific observation. These essentials qualified it as being admissible under the Act of June 20, 1936, ch. 640, § 1, 49 Stat. 1561, 28 USCA § 695, the Federal Shop Book Statute, as construed by this Court in the case of *New York Life Insurance Co. v. Taylor*, 79 U. S. App. D. C. 66, 147 F. (2d) 297; and the Municipal Court of Appeals so held. The evidence obtained from this record was not controverted by the appellant. The subsequent analysis performed by Dr. Yongue a short time thereafter thus did nothing more than demonstrate the accuracy of Dr. Alter's first analysis. The fact that the specimen contained .24 of 1% of alcohol was an uncontroverted and conclusive fact in the case, whether proved by demonstrative evidence alone or by a combination of de-

sanctity of the individual in the preservation of the public health, safety and welfare. These cases have respectively upheld compulsory vaccination, compulsory salpingectomy, compulsory physical examination, and compulsory blood test. We concede that the right of the sovereign to invade the person of the individual was in each of these cases buttressed upon a statute, and that no statute presently exists in the District of Columbia by which urine may be forcefully extracted or by which the introduction of urine into evidence is authorized.

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monstrative and testimonial evidence. But standing alone that fact meant nothing to the jury. The opinion evidence of the pathologist was necessary to convert the chemical finding into terms of intoxication which a jury could comprehend, and this was the evidence which the jury necessarily evaluated before reaching a conclusion of guilt. Accordingly, even if the oral testimony of Dr. Yongue was erroneously admitted, the error was harmless.

The decided Federal cases, however, do not support the view of appellant that the introduction of this oral evidence was erroneous. *U. S. v. S. B. Penick Co.*, 136 F. (2d) 413; *Murphy v. U. S.*, 39 F. (2d) 412. The specimen was in the possession of Officer Sennott less than one day. While in his hands it was subjected to normal police routine and the probabilities are overwhelming that it reached the chemist in a condition no different from that of the time of its taking. While in the hands of the chemist it was at all pertinent times labeled and stoppered, so far as is known, and stored in accordance with Health Department routine. Appellant makes much of the fact that it was accessible to many people, and that the label possibly could have come unfastened from the bottle. But while the specimen was accessible to many, there is no reason to conclude that those who had access to it would, in a spirit of deviltry or malice, deliberately adulterate the specimen. Although appellant had the opportunity while cross-examining Dr. Yongue to develop the possibility that another specimen labeled exactly or similarly to that of appellant was stored with it, the possibility that the label could have become unfastened, and the possibility that the specimen could have been adulterated, the record is silent on all of these questions. There is not, and logically cannot be, a requirement in a case of this type, that the history of the specimen be traced with such absolute certainty as to obviate the possibility of unanticipated change in quantitative content. The *Penick* case, *supra*, is direct authority for the proposition that this kind of case must rest upon probabilities. There specimens of ephed-

rine sulphate were shipped to a government chemist for analysis, the specimens remaining in the hands of the chemist for about three years. Defendant noted the possibility that the specimens could have become contaminated or adulterated while in the hands of the carrier, or thereafter. The trial court admitted the analysis results and samples into evidence, and was affirmed on appeal. The Circuit Court of Appeals of the Second Circuit said, at page 415 of the report:

“* * * It is true that before a physical object connected with the commission of a crime can properly be admitted in evidence, there must be a showing that such object is in substantially the same condition as when the crime was committed. [citation] But there is no hard and fast rule that the prosecution must exclude all possibility that the article may have been tampered with. [citation] In each case the trial judge before he admits it in evidence must be satisfied that in reasonable probability the article has not been changed in important respects. [citations] In reaching his conclusion he must be guided by the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it. Here the samples were taken in the ordinary course of business for the very purpose of being retained as samples; they were put in the usual place where samples were kept to remove them from accident or meddling and there they remained, so far as appear, undisturbed. We think this showing was sufficient to justify admission in evidence of the bottles and their contents and that it was for the jury to decide how likely it was that some other substance had been substituted for what was originally put in the bottles. *Pennsylvania R. Co. v. Fox & London*, 2 Cir., 93 F. (2d) 669, certiorari denied 304 U. S. 566, 58 S. Ct. 949, 82 L. Ed. 1532; *Hanify Co. v. Westberg*, 9 Cir., 16 F. (2d) 552.”

In the *Murphy* case, *supra*, an analogous situation was decided favorably to the prosecution. There the samples were

mailed to the chemist, but, as here, the stability of their condition while in the hands of the Post Office Department could not be traced to an absolute certainty. In disposing of the point the Court said:

"The evidence tended to show that there was no tampering with said exhibits, and that the opportunity to do so was extremely meager. It was within the discretion of the court to admit the evidence."

Also to the same effect are *Boyd v. U. S.*, 30 F. (2d) 900; *Shewitz v. U. S.*, 293 F. 581; *Hansen v. U. S.*, 61 F. (2d) 514; *Weaver v. U. S.*, 111 F. (2d) 603 and *U. S. v. Hefferman*, 35 F. (2d) 605.

CONCLUSION

It is respectfully submitted that the trial below was conducted in accord with existing principles of law, that the defendant received a trial which was fair and equitable in all respects, and that the judgment of the Municipal Court of Appeals for the District of Columbia should be affirmed.

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